Served: July 1, 1992

NTSB Order No. EA-3603

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. SE-11680

WILLIAM L. GRAY,

Respondent.

OPINION AND ORDER

The respondent and the Administrator have both appealed from the oral initial decision Administrative Law Judge Joyce Capps issued in this proceeding on May 14, 1991, at the conclusion of a two-day evidentiary hearing.[1] By that decision the law judge affirmed in part an order of the Administrator suspending[2] respondent's Inspection Authorization[3] on an

[1]An excerpt from the hearing transcript containing the initial decision is attached.

[2]The Administrator originally issued an emergency order revoking respondent's Inspection Authorization. Respondent waived the rules applicable to emergency proceedings.

[3]Respondent is the holder of a Mechanic Certificate with Airframe and Powerplant (A & P) ratings and Inspection Authorization.

allegation that he violated section 43.15(a)(1) of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 43[4] by failing to conduct an "annual type" inspection on civil aircraft N873SN in a manner to assure that the aircraft met airworthiness standards required by its type certificate and those standards required for the issuance of a special flight permit or an Export Certificate of Airworthiness, and by returning the aircraft to service.[5]

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. For the reasons that follow, we will deny both respondent's and the Administrator's appeals, and affirm the law judge's oral initial decision.

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[4]FAR section 43.15(a)(1) at the time of the inspection provided as follows:

"§ 43.15 Additional performance rules for inspections.

(a) General. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter, shall-

(1) Perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all applicable airworthiness requirements..."

[5]The Administrator's order also alleged a violation of FAR §43.12(a)(1) (asserting fraud or falsification of the inspection checklist and the aircraft's logbook). The Administrator has not appealed the law judge's finding in respondent's favor as to the falsification charge. As to sanction, the Administrator does not argue for reinstatement of revocation, but does contest the law judge's assessment of a 30 day suspension, infra.

The underlying facts which gave rise to the Administrator's complaint are not in dispute. The aircraft in question, a Douglas Model R4D-8, is similar to a Super DC-3. It had been owned by a now-defunct Part 121 carrier and had apparently not been in use for several years, when someone in the Philippines decided to purchase it. Robert Konopka, an A & P mechanic, was hired to get the aircraft, which was in very bad condition, into sufficient repair to receive an Export Certificate of Airworthiness and be flown out of the United States with a special ferry permit. Konopka hired respondent to inspect the aircraft after he repaired it.

Konopka worked on the aircraft full time between February 2, 1990 and February 25, 1990. Respondent began his inspection sometime in February, and completed it on March 19, 1990. The inspection was conducted at Willow Run Airport in Ypsilanti, Michigan. Prior to completing the inspection, respondent and Konopka met with FAA Aviation Safety Inspector Johnson of the FAA's Detroit Flight Standards District Office (FSDO) in order to discuss the requirements of an inspection for export purposes. There was apparently some discussion concerning the type of inspection which had to be performed, and the type of inspection checklist which should be used by respondent. Inspector Johnson did a walk-around inspection of the aircraft, and pointed out several deficiencies to

Konopka which he indicated would have to be repaired before a certificate of airworthiness could be issued. Inspector Johnson apparently dictated to respondent the requisite language for respondent to enter into and sign off on in the logbook, in order to obtain the ferry permit and certificate of airworthiness. Inspector Johnson subsequently issued the ferry permit and export certificate of airworthiness based on respondent's certification (Exhibit A-2) that:

> ...[T]his aircraft has been inspected as required by 21.329(c) in accordance with Appendix D of Part 43 and is approved for return to service for purpose of export and sale.

On April 10, 1990, a pilot arrived in Ypsilanti to fly the aircraft to the Philippines. The pilot was unable to start the engines and contacted a mechanic named Michael Church of the IFL Group in Pontiac, Michigan, to get the aircraft running. Mr. Church went to Ypsilanti to work on the aircraft. He replaced the magnetos on the Number 1 (left) engine and was able to get it running. Mr. Church noticed several other deficiencies, and performed additional work on the aircraft. The aircraft was then flown to Pontiac so that mechanics at IFL Group's main facility could perform even more work on the aircraft. On April 25, 1990, Inspector Johnson was in Pontiac on other business when he noticed the aircraft on the ramp. This certificate action resulted in the aftermath of Inspector Johnson's discovery of the

aircraft on the ramp in Pontiac; the Administrator's position holds that respondent's inspection was defective because the aircraft still had numerous deficiencies, some of which Inspector Johnson had noted during his walk-around inspection in March, which rendered the aircraft unairworthy, even after respondent had inspected it and certified its return to service for purposes of export.

As a preliminary matter, we will address respondent's contention that this entire certificate action should be set aside because he had no responsibility to perform an inspection under FAR Part 43, and therefore his certification, regardless of the aircraft's condition, should not result in a suspension of his Inspection Authorization. We find this contention devoid of merit.

The inspection performed by respondent in order to obtain issuance of the certificate of airworthiness was made pursuant to FAR section 21.329(c), which provided at the time of the inspection, in pertinent part, as follows:

> § 21.329 Issue of export certificates of airworthiness for Class I products.
>
> An applicant is entitled to an export certificate of airworthiness for a Class I product if that applicant shows at the time the product is submitted to the Administrator for export airworthiness approval that it meets the requirements of paragraphs (a) through (f) of this section, as applicable, except as provided in paragraph (g) of this section.
> (c) Used aircraft must have undergone an annual type inspection and be approved for return to service in accordance with Part 43 of this chapter....

Respondent asserts that, notwithstanding the fact that he performed an "annual type" inspection and approved the aircraft for return to service in accordance with FAR Part 43,[6] he cannot be held responsible under FAR section 43.15(a)(1) because that regulation is prefaced with the following language: "Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter, shall...." Since he performed an inspection required by Part 21 and not any of those parts of the FAR enumerated in the regulation, he argues that he need not have complied with the regulation. We disagree. As Inspector Johnson explained in his testimony, FAR section 91.27 (as written at the time of the inspection) prohibited any operation of an aircraft without an airworthiness certificate.[7] Thus, in order for this aircraft to be flown to the Philippines from the United States, as the individuals involved in its sale and purchase

[6]Respondent admitted on the stand that he may not have inspected every item Konopka said he fixed (TR-465), and according to the investigating FAA Inspector, he admitted during the investigation that he may have "overlooked" some items. (TR-57).

[7]Inspector Johnson also explained what we think is abundantly clear: that the issuance of an export airworthiness certificate under §21.325, or for that matter any airworthiness certificate, does not authorize the operation of an aircraft. Respondent's claim that a cursory walk-around of the aircraft by an FAA Inspector or the FAA's subsequent issuance of an airworthiness certificate in reliance on an IA's certification could somehow relieve him of responsibility for his certification has been rejected by the Board in dicta. See Administrator v. Nightingale, 3 NTSB 3860 (1981).

contemplated, an inspection[8] under Part 91 was required.[9]

Turning to the substantive allegations, both respondent and the Administrator appeal the law judge's findings that some but not all of the alleged deficiencies discovered in April, 1990, were deficiencies which respondent, having inspected the aircraft, knew or should have known existed, and which he knew or should have known would render the aircraft unairworthy. We have reviewed the entire transcript of the proceedings and the exhibits in this matter, and we cannot conclude that the law judge's findings are not supported by a preponderance of the substantial, reliable, and probative evidence of record. In the Board's view the law judge's findings were to a large extent based on her

[8]Respondent's argument that he should not be held responsible for deficient performance of an "annual type" inspection because the regulations fail to define an "annual type" inspection, is disingenuous. Respondent actually knew that the aircraft could not undergo an "annual" because it was a large aircraft, see FAR §91.181, and could not be certified as airworthy under a continuous inspection program because it had not been operated by a Part 121 carrier for years, see FAR §91.169. He was instructed by the FSDO that he should, therefore, follow the guidelines for an inspection contained in Appendix D to Part 43. His certification in the logbook that he followed that inspection checklist, as indicated by his signature in the logbook, was an exercise of the privileges of his inspection authorization. The FAA relied upon his certification by thereupon issuing the special ferry permit and certificate of airworthiness.

[9]Respondent's narrow interpretation of FAR section 21.329(c) also ignores the language contained in FAR section 21.329(a), which provides that an applicant is entitled to an export certificate of airworthiness for a used aircraft manufactured in the United States only if it meets the airworthiness requirement for a standard U.S. airworthiness certificate.

credibility determinations in favor of the Administrator's witnesses, and to the extent that she found that some of the deficiencies alleged were either not so egregious so as to render the aircraft unairworthy or may not have even existed at the time of the inspection,[10] we find no error. We therefore adopt the law judge's factual findings as our own.

Finally, the Administrator contests the law judge's assessment of a 30-day suspension of respondent's Inspection Authorization, but fails to cite any sufficiently similar Board precedent which would dictate a greater sanction. The cases cited by the Administrator dictate sanctions from 60 days to revocation where there is a history of prior violations, a factor which does not exist in this case. We think that under the circumstances found here, the sanction assessed by the law judge is reasonable.

[10]There was evidence that certain of the deficiencies, e.g., the defective magnetos, may have developed during the interim period between the inspection and the operation of the aircraft when it was left outdoors on the ramp and was subject to the elements.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's and the Administrator's appeals are denied; and

2. The Administrator's order, as modified by the law judge, and the initial decision and order are affirmed.[11]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11]The 30-day sanction has apparently already been served, as respondent surrendered his privileges pursuant to the emergency revocation order.